The appellant paid a sum of $97,765.62 by way of deposit and in part payment of the purchase price on signing the agreement. He was to pay a further sum of $30,000 on or before July 29, 1974 and to complete the purchase by paying the balance of the purchase price amounting to $699,890.63 on or before September 28, 1974. Time was stated in the agreement to be of the essence of the contract.

The appellant paid the sum of $30,000 as agreed but he failed to pay the balance of the purchase price on or before the due date, whereupon the respondents purported to forfeit the total sum paid by the appellant as liquidated damages for breach of contract as provided in clause 5 of the agreement and notified the appellant accordingly by their solicitors' letter of September 30, 1974.

In their affidavit in support of the motion for the removal of the caveat, the respondents stated, *inter alia*, that they had never agreed to any extension of time beyond the date stipulated for the completion of the purchase. In opposing the application, the appellant filed a lengthy affidavit in which he stated that there was an earlier agreement of sale in relation to the same land which had not been specifically cancelled or withdrawn by the agreement of June 28, 1974, that this latter agreement did not contain all the terms as agreed orally including the term that time shall not be of the essence of the contract, that the respondents had agreed to an extension of time for a period of two months from September 28, 1974, and that he had enhanced the value of the land by building an access road with the knowledge and consent of the respondents so that they were estopped from denying his interest in the land.

After giving due consideration to the affidavits and the submissions made on behalf of the parties the learned judge came to the conclusion that the appellant had no caveatable interest in the said land within the meaning of section 323(1) of the National Land Code. He accordingly made the order appealed from. In reaching that conclusion the learned judge made certain findings of fact on the affidavits before him, namely, that by their second agreement of June 28, 1974 the parties had mutually agreed to terminate the earlier agreement of December 16, 1973 and that the respondents had not agreed to any extension of time for the completion of the purchase and the appellant had made no attempt whatsoever to complete the purchase at any time.

It would seem clear from the learned judge's grounds of judgment that he made the order for the removal of the caveat because he took the view that the appellant ceased to have any caveatable interest in the land after the respondents had repudiated the contract on the ground that the appellant had failed to complete the purchase on or before the agreed date. With respect to the learned judge, repudiation by one party to the agreement cannot preclude the other party from suing on the contract.

As has been stated again and again, the whole system of caveat is founded on the principle that they exist for the protection of alleged as well as proved interests. In the recent case of *Registrar of Titles, Johore* v. *Temenggong Securities Ltd. & Anor.*,[1] Lord Diplock in delivering the judgment of the Privy Council stated that —

"The purpose of a private caveat is to preserve the *status quo* pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts."

Thus, the lodging of a caveat is really in the nature of the initiation of litigation. It need hardly be said that the rights of the parties under a contract can only be determined in a proper action and not merely on affidavits. In other words, whether or not there has been a breach of contract on the part of any of the parties is a question which can only be decided in a proper action.

The only ground in support of the appeal before us was that the appellant had a caveatable interest in the land even though the respondents had purported to forfeit the deposit to put an end to the contract and notwithstanding that time was of the essence of the contract. The argument which was put forward on behalf of the respondents was that the appellant had no caveatable interest because the agreement had been lawfully terminated. In our judgment, whether or not the agreement has been lawfully terminated can only be decided in the action which the appellant, we were given to understand, had in fact brought in relation to the agreement of sale.

For the reasons which we have stated we allowed the appeal and set aside the order of the learned judge that the caveat be removed.

Appeal allowed.

Solicitors: *N. Ramachandran & Co.; Chooi & Co.*

NIHAL SINGH v. BHAG SINGH

[A.C.J. (Hashim Yeop A. Sani J.) January 2, 1976]

[Seremban — Civil Appeal No. 11 of 1974]

Practice and Procedure — Appeal — Findings of fact by trial Magistrate — Onus on appellant to displace conclusion formed by trial Magistrate — Limitation.

This was an appeal against the decision of the learned magistrate, Kuala Pilah in a claim for money lent as a friendly loan with a promise to repay, where the learned magistrate gave judgment in favour of the plaintiff in the sum of $900 and costs. The defendant appealed and the grounds of appeal were —

(a) that the learned magistrate failed to give due weight to the evidence of the defendent and relied heavily on the demeanour of witnesses of the plaintiff. The learned Magistrate also wrongly admitted a document which should not have been admitted. All these prejudiced the mind of the learned Magistrate, and resulted in erroneous findings of fact.

(b) The learned magistrate had failed to consider the pleading as to limitation and make a finding on the question of limitation.

Held, dismissing the appeal: (1) the learned magistrate in this case had made definite findings of fact and the onus on the appellant to displace the conclusion formed by the learned magistrate was a heavy one and in this case he had failed to discharge it;

(2) because of the findings of the learned magistrate that a loan was given with a promise to repay and that payments towards the loan were made on three separate occasions, the

last of which was in 1971, it was not necessary for the learned magistrate to decide the question whether the claim was statute-barred.

Cases referred to:-

(1) *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Kartar Kaur* [1969] 1 M.L.J. 137.
(2) *Yuill* v. *Yuill* [1945] P. 15 at p. 19-20.
(3) *Chia Bak Eng & Anor.* v. *Ponggol Bus Service Co.* [1966] 2 M.L.J. 224.
(4) *Putra* v. *Sivagnanam* [1959] M.L.J. 259.
(5) *Thomas* v. *Thomas* [1947] A.C. 484.
(6) *Bennax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370 at p. 375—6.
(7) *Luk Dai Chung* v. *Ngu Ee Nguok* [1966] 1 M.L.J. 119.
(8) *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87.
(9) *Clarke* v. *Edinburgh and District Tramways Co. Ltd.* [1919] S.C. (H.L.) 35, 37.
(10) *F.R. Carey* v. *T.S. Kong* (1914) 1 F.M.S.L.R. 162.
(11) *Sant Lal* v. *Kamala Prasad* A.I.R. 1951 S.C. 477.
(12) *Perry* v. *Jackson* (1791) 4 T.R. 300.
(13) *Sturgis* v. *Darell* (1860) 6 H. & N. 120.
(14) *Lloyds* v. *Butler* (1950) 1 K.B. 76 C.A.
(15) *Edmonds* v. *Waugh* (1886) L.R. 1 Eq. 418, 421.
(16) *China* v. *Harrow U.D.C.* [1954] 1 Q.B. 178, 185.

CIVIL APPEAL.

Atma Singh for the appellant.

Datuk Balwant Singh for the respondent.

Hashim Yeop A. Sani J.: This is an appeal against the decision of the learned Magistrate, Kuala Pilah, in a claim for money lent as a friendly loan with a promise to repay where the learned Magistrate entered judgment in favour of the plaintiff in the sum of $900 with costs.

In the Memorandum of Appeal by the defendant seven grounds were set out which for convenience can be reduced to two broad grounds as follows: —

(1) The failure of the learned Magistrate to give due weight to the evidence of the defendant (which denied the loan or that there was any part payments made thereto), the admission of a document (exhibit P4) which should not have been admitted and too heavy reliance on the demeanour of witnesses of the plaintiff by the learned Magistrate. All these prejudiced the mind of the learned Magistrate and resulted in erroneous findings of fact;

(2) The failure of the learned Magistrate to consider the pleading as to limitation period and make a finding on the question of limitation.

In his grounds of judgment it would appear that the learned Magistrate reduced the whole question in that case to one of fact whether the loan was made. In this regard the learned Magistrate stated that he found that the story of the plaintiff on this disputed issue was corroborated by PW2 and also corroborated by a letter (P4) although for reasons best known to him he omitted mentioning the evidence of PW3.

Let me deal with PW2 first. PW2 is the son of the defendant. According to his testimony he said he became aware of the transaction between the plaintiff and the defendant (his father) when the defendant himself informed him of it. When the defendant did not settle the loan in full PW2 wrote to his mother in India asking her to write to the defendant to repay the money to the plaintiff. This resulted in the letter (P4). PW2 said he was also aware of the first 2 payments made by the defendant to the plaintiff but the third payment was told to him by the plaintiff himself. On behalf of the appellant it was argued that PW2 should not be relied upon for corroboration since there had been some difference between the father and the son. With respect, the existence of "normal differences" (using the words of PW2) between him and his father (the defendant) should not be the sole reason which would entitle the learned Magistrate to reject his evidence. The learned Magistrate was entitled to look at the whole of the evidence and then consider whether PW2 was a witness to be believed and his evidence to be accepted. Judging from the grounds of judgment of the learned Magistrate he was satisfied that even if the plaintiff's evidence was not corroborated by the evidence of PW2, he had observed the demeanour of the plaintiff from the witness box and he came to the conclusion that the plaintiff was a witness of truth. Corroboration can in fact also be found in the evidence of PW3 who is related to both the plaintiff and the defendant. In his evidence PW3 stated that sometime in December 1967 he and the defendant went to the plaintiff's house to repay some money, the amount of which was $50 and in 1971 the plaintiff also informed him that he had further received $200 from the defendant. It is also in the evidence of PW3 that he had a "misunderstanding" with the defendant but as in the case of PW2 the learned Magistrate could not reject this evidence solely on that ground. On the whole I see nothing wrong in accepting the evidence of PW2 and PW3 as good corroboration.

Coming to exhibit P4 which the appellant argued should have been disallowed it can be seen that P4 was a letter from one Tej Kaur. The envelope was addressed to one Nika Singh of General Hospital, Seremban, but the letter itself was addressed to Nihal Singh, the appellant. Tej Kaur is the wife of the appellant and the mother of PW2. Tej Kaur is illiterate and the letter was written by the sister of PW2 whose handwriting was identified by him. There is nothing on the record that appellant objected to the admission of P4 at the hearing before the learned Magistrate. What was questioned during the hearing was the content of P4. As *Sarkar* on Evidence, 12th Edition, page 640 says that the usual mode of proving a document is by calling the writer or by the testimony of persons acquainted with the handwriting in question. However, this method of proof is not always available, *e.g.* when a letter purporting to be from A is received and it is not known who wrote it, or when an unsigned or an anonymous letter is received, or when an illiterate person gets his letter written by another person and in such cases when it is not possible to get handwriting testimony, a document is sometimes regarded as evidenced by its contents. The contents of P4 clearly indicate that the letter is from a wife to the husband and references to the plaintiff and the loan and the repayments were also made.

The appellant also attacked the grounds of judgment of the learned Magistrate for not giving consi-

deration to another letter (exhibit D5). This letter was produced in the evidence of the defendant and also admitted by him to have been written by his daughter on behalf of his wife. It seems strange that in this case the appellant does not argue that D5 should not have been admitted by the learned Magistrate in the first place but merely argues that D5 should be believed instead of P4. Letter D5 denies the loan and that the family "owe nothing to anybody." It should however be borne in mind that D5 was written on April 29, 1974, *i.e.* about 12 years after the letter (P4). To my mind it is without doubt that if any reliance is to be given on either exhibit P4 or exhibit D5 the former would seem to be the more reliable because it was written before any litigation in court was anticipated.

It is also argued on behalf of the appellant that the learned Magistrate relied too much on the demeanour of the witnesses for the plaintiff without further tests. He relies on *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Kartar Kaur & Anor.*[1] where the Federal Court judgment quoted from *Yuill* v. *Yuill*[2] the following: —

"an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by a trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

But it cannot be said in this case that the learned Magistrate depended solely on the demeanour of the witnesses because corroboration by PW2 and exhibit P4 is clearly stated in his grounds. In my view it was merely to emphasize his observation as to the demeanour of the plaintiff that the learned Magistrate said in his grounds that "even if there is no corroboration I hasten to add that judging from the demeanour of the plaintiff he is a witness of truth." Comparing the evidence of the plaintiff and that of the defendant he found that the defendant was an "unmitigating liar" and that the demeanour of the defendant under cross-examination was he said most unsatisfactory. It is alleged by the appellant that the learned Magistrate was so influenced by the version of the plaintiff and ignored entirely the evidence of the defendant citing *Chia Bak Eng & Anor.* v. *Ponggol Bus Service Co.*[3] To understand this finding of the learned Magistrate one has to examine the evidence of the defendant. The defendant in his testimony merely denied the loan and denied all the repayments. He also denied the contents of P4 and said that he is not even sure that his daughter wrote the letter. To my mind this last bit is significant because as an illiterate man he could not have identified that the handwriting on P4 was not that of his daughter, *i.e.* contrary to the testimony of PW2. Thus although the learned Magistrate used rather strong terms by stating that the defendant appeared to him to be an "unmitigating liar" the learned Magistrate could not in my view have come to any other finding on this evidence.

The learned Magistrate had made definite findings of fact and there is an abundance of authorities that in the hearing of an appeal from the decision of a judge sitting without a jury involving questions of fact an appellate court is guided by certain principles. In *Putra* v. *Sivagnanam & Anor.*[4] it was repeated in the judgment of Hepworth J. that when the evidence is that of witnesses whom the trial judge had seen and heard the authority most frequently quoted on this question is the speech of Lord Thankerton in *Thomas* v. *Thomas*[5] at pages 487-8 in particular the following passage: —

"I. Where a question of fact has been tried by a judge without jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

This passage was quoted with approval by Lord Reid in the House of Lords in the case of *Benmax* v. *Austin Motor Co. Ltd.*[6] at pages 375-6, as being applicable to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision as a whole. This principle has been followed in a number of cases in this country including *Luk Dai Chung* v. *Ngu Ee Nguok.*[7] Finally, the onus on the appellant is heavy in this regard as stated in *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.*[8] in the judgment of the Judicial Committee of the Privy Council where Lord Guest said (at page 92): —

"There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt* or *Thomas* v. *Thomas* at page 487. . . .

Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke* v. *Edinburgh & District Tramways Co. Ltd.*[9]

'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with these privileges was plainly wrong, then it appears to me to be my duty to refer to his judgment'."

Looking at the record and the grounds of judgment I see nothing to satisfy me that the findings of fact of the learned Magistrate were erroneous.

Now I will come to the second ground raised in the appeal. From the Appeal Record it would appear that the right of action accrued initially in 1959-1960 and part payments were made in 1963, 1967 and 1971 respectively, as stated in paragraphs 3 and 4 of the statement of claim which read as follows: —

"3. In the year 1959 the plaintiff loaned a sum of Rs.1,800 in Punjab to the defendant and upon his return to Malaysia

in late 1959 or early 1960 the defendant promised to repay the said sum of Rs.1,800 in Malaya currency in the sum of $1,200 to the plaintiff.

4. The defendant has so far repaid to the plaintiff a sum of $50 in 1963, a sum of $50 in 1967 and a further sum of $200 in February, 1971."

According to the testimony of the plaintiff at page 6 he stated that he and the defendant were relatives and that in 1959 defendant asked him for a loan of 2,000 Rupees. He further stated in his evidence as follows: —

"It was agreed that the money would be repaid in Seremban. He repaid me $50 one time. The second time $50 and $200 another time in 1971."

In paragraphs 3 and 4 of the statement of defence the defendant denied that there was ever such a contract or at all and that among other things he also denied any part payment towards the loan was ever made. In paragraph 4 of the statement of defence the defendant further averred that the alleged repayment was "fictitious to circumvent the Limitation Ordinance." Paragraph 7 of the Memorandum of Appeal attacks the grounds of the learned Magistrate for failing to consider this pleading as to limitation period barring the said action and that certain payments alleged were artificial and fictitious revival of the cause of action. It is also alleged that the learned Magistrate failed to consider that there was no written acknowledgement of the alleged debt by the defendant. It would appear to me that looking at the Memorandum of Appeal on this point the appellant is attacking the grounds of the learned Magistrate firstly on the grounds that the learned Magistrate failed to consider the pleading as to limitation and secondly on the grounds that the learned Magistrate failed to consider that the evidence on the payments made were fictitious and false and finally on the grounds that there was no written acknowledgement of the alleged debt by the defendant. However, during the argument it transpired that it is also the proposition of the appellant that to invoke the Limitation Ordinance the acknowledgement of the debt as well as the payments must be in the handwriting of the defendant.

Cited first for his proposition that the learned Magistrate was wrong in law for not considering the pleading as to limitation is the case of *F.R. Carey* v. *T.S. Kong*.[10] However that case was decided on the question whether in the absence of the defendant who had been served with a summons the trial judge should dismiss the claim if the suit appears from the statement of plaint that the cause of action arose more than three years before the plaint was filed. What happened in that case was that sometime in January 1914 the plaintiff/appellant brought a suit against the defendant/respondent to recover money due on account of goods supplied prior to June 1909. The plaint was admitted by the Registrar. The defendant on being served with summons addressed a letter to the Registrar stating by way of defence that the suit was barred by the Limitation Enactment but the defendant failed to appear on the date of hearing. The learned judge held that, having regard to the provisions of section 44 of the Civil Procedure Code, which required that a plaint should be rejected if the suit appeared from the statement in it to be barred by any positive rule of law, it was the duty of the Registrar who acted for the court to have rejected the plaint and that being so it was the duty of the trial judge on seeing that the plaint ought to have been rejected to dismiss the suit without regard to the non-appearance of the defendant at the hearing. The question before the appellate court then was whether the learned judge was wrong in the view he took of the law.

Sant Lal v. *Kamla Prasad*[11] was cited on behalf of the appellant for the proposition that sections 26(2) and 27(1) of our Limitation Ordinance, 1953 should be given the same construction as that given to section 20(1) of the Indian Limitation Act and that is in the words of the judgment of the Supreme Court:

"It would be clear, we think, from the language of section 20 Limitation Act, that to attract its operations two conditions are essential: first, the payment must be made within the prescribed period of limitation and secondly, it must be acknowledged by some form of writing either in the handwriting of the payer himself or signed by him. We agree with the Subordinate Judge that it is the payment which really extends the period of limitation under section 20, Limitation Act but the payment has got to be proved in a particular way and for reasons of policy the legislature insists on a written or signed acknowledgement as the only proof of payment and excludes oral testimony. Unless, therefore, there is acknowledgement in the required form, the payment by itself is of no avail."

Further down in the judgment Mukherjea J. said: —

"To claim exemption under section 20, Limitation Act the plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the principal, but that such payment had been acknowledged in writing in the manner contemplated by that section. The ground of exemption is not complete without this second element and unless both these elements are proved to exist at the date of the filing of the plaint the suit would be held to be time barred."

Section 20(1) of the Indian Limitation Act reads as follows: —

"20(1). Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in his behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in his behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of a payment of interest made before January 1, 1928, an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

The relevant provision of section 26(2) of our Limitation Ordinance *inter alia* states that where any right of action has accrued to recover any debt or other liquidated pecuniary claim and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment. The proviso to this subsection is not applicable here. Section 27(1) of our Ordinance states that "every such acknowledgement as is referred to in section 26" shall be in writing and signed by the person making the acknowledgement. Subsection (2) of this section further provides that any such acknowledgement *or* payment as is referred to in section 26 may be made by the agent of the person.

There has been a divergence of authorities as to what should be the proper construction to be adopted

to a Limitation Enactment, *i.e.* whether it should be the "liberal construction (*Perry* v. *Jackson*,[12] *Sturgis* v. *Darell*)[13] or "strict literal construction" (*Lloyds* v. *Butler*,[14] *Edmunds* v. *Waugh*[15] — "an Act taking away existing rights which must be construed with reasonable strictness.") But it appears that there is today no special method of construing Limitation Enactments — see *China* v. *Harrow, U.D.C.*[16] — Goddard L.C.J.:

"I can see no good reason for unduly limiting words which can apply to a particular case as the courts have always been against stale claims."

It would seem to me that the provisions of section 26(2) and section 17(1) of our Limitation Ordinance are closer in their terms to sections 23(4) and 24(1) and (3) of the U.K. Limitation Act, 1939. *Halsbury's* Laws of England, 3rd Edition, Volume 24, at page 208, paragraph 376 would also seem to distinguish between "acknowledgement" and "part payment". Therefore against the argument of the appellant on this point I would simply say that the intention of the legislature in our Limitation Ordinance is clearly expressed in the two subsections of section 27 of the Ordinance whereby subsection (1) provides that every acknowledgement shall be in writing and signed by the person making the acknowledgement and that subsection (2) provides that any such acknowledgement or payment may be made by the agent of the person by whom it is required to be made under section 26. It is the acknowledgment that must be in writing although both acknowledgement and payment may be made by the agent of the person. The distinction which must have been intended by the legislature with the words "acknowledgement" and "payment" used side by side is too marked to be overlooked or confused.

It is true that the grounds of judgment of the learned Magistrate omitted any reference to the Limitation Ordinance but to me this is not surprising having regard to the fact that having heard both the evidence of the plaintiff and the defendant he made findings of fact that (a) a loan was given with a promise to repay, and (b) payments towards the loan were made on three separate occasions, the last of which was in 1971. With those findings he might have considered it no longer necessary for him to decide on the question whether the claim was time barred. The omission by the learned Magistrate in this regard would not have affected the decision of this case.

One last word on a point raised early in the argument of the counsel for the respondent. This arises from the order I made at the previous hearing of the appeal where counsel for the appellant applied for postponement with a view to obtaining an affidavit from some person or persons from India to negate the existence of the loan in question. The application for adjournment was granted but until the date of the second hearing of the appeal no affidavit was filed by the appellant. It is urged on behalf of the respondent that the failure by the appellant to file the affidavit, which was the only ground for the application for adjournment, should entitle the court to presume against the appellant in the terms of section 114(g) of the Evidence Act, 1950. The explanation given on behalf of the appellant for this failure was that the defendant's wife in India is illiterate and therefore the statutory declaration or the affidavit could not be obtained. In my view this excuse is unreasonable as the fact that a person is illiterate does not make it impossible for that person to swear a statutory declaration or affidavit as the case may be. Therefore, with respect, I have to agree that under the circumstances it would be proper to infer that this new evidence (which was the sole reason for the adjournment) if produced would be unfavourable to the appellant.

For all the above reasons I have to dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Atma Singh Gill & Gill; Datuk Balwant Singh.*

PUBLIC PROSECUTOR v. HETTIARACHIGAE L.S. PERERA

[R.Cr.J. (Harun J.) May 7, 1976]
[Kuala Lumpur — Criminal Revision No. 4 of 1976]

Criminal Law and Procedure — Revision — Case postponed several times — Prosecution applied for adjournment on grounds that investigation had not been completed — Whether magistrate justified in acquitting and discharging defendant at that stage — Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(f), (g), (m)(1), (n), 254 — Criminal Procedure Code (S.S. Cap. 21), ss. 182(g), 187 — Federal Constitution, art. 145.

The defendant was alleged to have neglected to exercise due control over his motor-car on August 14, 1973 at about 11.00 p.m. at Bulatan Data, Kuala Lumpur. The return date of the summons was October 24, 1974. When the case came up for hearing on November 11, 1974, the prosecution said that its witnesses were not available and hearing was postponed to November 28, 1974. On the adjourned date the prosecution said an important witness was absent and the magistrate discharged the defendant not amounting to an acquittal. Thereafter the prosecution applied for a fresh summons. The hearing date was adjourned again as the Magistrate was on leave. When the defendant appeared on December 23, 1975, the prosecution sought for an adjournment on the grounds that investigation had not been completed. Counsel for the defendant objected on the grounds that there had been several postponements in the past and the charge should not be left hanging on the defendant's head for so long. The magistrate thereupon acquitted and discharged the defendant.

The case had been called for on revision and the question before the court was whether the magistrate was right in making the order of acquittal at that stage.

Held, setting aside the magistrate's order of discharge and acquittal: (1) the prosecution's case had not been heard and the only power the magistrate had was to order a discharge under section 173(g) C.P.C., such discharge not amounting to an acquittal. In any event, a magistrate may only exercise his powers under section 173(g) C.P.C. if he considers the charge to be groundless. The magistrate therefore had no power to order an acquittal;

(2) according to article 145 of the Federal Constitution only the Attorney-General has the power to institute, conduct or discontinue any proceedings for an offence. Until he makes up his mind the courts have to wait. Magistrates therefore have no business to usurp the functions of the Attorney-General. If the police are slow complaints should be made to the Attorney-General who in the final analysis is answerable to Parliament.